



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of )

Stringfellow, et al. )

Serial No. 10/560,999 )

Filed November 15, 2006 )

For FUNGICIDAL COMPOSITION )  
THROUGH PERIDERM BARK )  
APPLICATION TO WOODY PLANTS )

Group Art Unit 1616

**CERTIFICATE OF MAILING**

I hereby certify that this correspondence was deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop AMENDMENT, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on 5/1/08.

  
Jennifer Thornton, Secy. to Arthur M. Reginelli

**DECLARATION OF Franklin E. Sexton**

**37 C.F.R. § 1.132**

Sir,

I hereby declare that:

1. My professional experience includes over 16 years of agricultural chemical experience. I have worked for at least 14 years as a formulator making agricultural compositions. Much of my work has included formulating surfactants into agricultural and pesticide related compositions.

3. I am currently employed by Exacto, Inc. and hold the position of technical service manager.

4. I am a co-inventor of U.S. Patent No. 6,040,272 entitled Aqueous Glyphosate/Surfactant Compositions for Basal and Dormant Stem Brush Control.

5. I have been asked by Mr. William Stringfellow, the inventor of the invention described in U.S. Application No. 10/560,999, to provide my opinion as to what one of ordinary skill in the art understood at the time of Mr. Stringfellow's invention.

6. I have reviewed U.S. Publication No. 2007/0166340 A1, which is the publication of Mr. Stringfellow's invention that is currently under examination as U.S. Application No. 10/560,999. I understand that the Examiner believes that Mr. Stringfellow's invention would have been obvious:

7. As provided in the background section of U.S. '340, systemic fungicides were employed (at the time of Mr. Stringfellow's invention) to treat trees infected with sundry diseases. Those skilled in the art also understood that in order to be effective, systemic fungicides must enter into the vascular system of a tree. This could be accomplished by foliar application, soil application for eventual uptake through the root system of a tree, or by mechanical penetrating the bark of a tree to deliver the systemic fungicide to the internal portions of a tree. See, for example, U.S. Patent No. 2,947,111 to Zobrist, which also explains some of these methods.

8. One skilled in the art also understood that systemic fungicides could not be applied to the bark or periderm of a tree inasmuch as systemic fungicides cannot penetrate the bark or periderm of a tree. What was common practice at the time of Mr. Stringfellow's invention was mechanical penetration of the bark. Again, I reference the background of Mr. Stringfellow's U.S. '340 Publication as well as Zobrist '111, column 1, lines 58-64 as proof of this practice.

9. At the time of Mr. Stringfellow's invention, one of skill in the art would have been familiar with the invention described in U.S. Patent No. 6,040,272, which employs certain surfactants to achieve through-bark application of herbicides to woody plants. With this knowledge, however, I do not believe that one of skill in the art (including myself) would have predicted that this technology could have been extended to satisfy the desire to deliver systemic fungicides to the vascular systems of woody plants. This would not have been a predictable solution for several reasons.

10. To begin with, those skilled in the art understand that fungicides and herbicides are two classes of entirely distinct agricultural chemicals. In fact, a fungicide is the antithesis of a herbicide. That is, while fungicides are employed to assist in plant growth and vitality, herbicides are employed to kill plants.

11. Also, the field of surfactants —particularly for agricultural applications— is unpredictable. That is, there are very few —if any— empirical standards by which one can predict the success of any given surfactant in any given environment. Many factors come into play including the target species, the location of application (e.g. periderm or foliar), the environmental conditions, and the complementary agricultural chemical. Because of this unpredictability, and the many variables involved, it is my opinion that one of skill in the art could not predict whether organosiloxanes would have been effective in providing through-bark penetration of fungicides.

12. In short, I am surprised by the success of Mr. Stringfellow's invention.

13. Also, the ability to formulate agricultural applications compositions including surfactants is often unpredictable. Very few —if any— empirical standards by which one can predict the success of any given surfactant in any given environment exist. Many factors come into play including the target

species, the location of application (e.g. periderm or foliar), the environmental conditions, and the complementary agricultural chemical. Because of this unpredictability, and the many variables involved, it is my opinion that one of skill in the art could not predict whether organosiloxanes would have been effective in providing through-bark penetration of fungicides as discovered by Mr. Stringfellow.

14. I declare that all statements made herein of my knowledge are true and that all statements made on information and belief are believed to be true and, further, that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the U.S. Code and that such willful false statements may jeopardize the validity of this application and any patent issuing thereon.

Respectfully submitted,

Franklin E. Sexton

Franklin E. Sexton

Date: \_\_\_\_\_

4-30-08